



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 34 OF 2015

A.M. KIMANI & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

TRIDENT INSURANCE COMPANY LIMITED.....CLIENT/ RESPONDENT

RULING ON REFERENCE

1. This is a ruling on a reference from the decision on the taxation of an Advocate/Client Bill of Costs.
2. The Advocate was aggrieved with the decision on 3 items as follows;
 - a. The Instruction fee which was allowed at Kshs. 15,000/- whilst the Advocate had asked for Kshs. 65,000/-.*
 - b. The Attendance fee for an hour on 1st September 2011, in respect to which the whole sum of Kshs. 2,100/- was disallowed.*
 - c. Disbursements in respect to photocopies, telephone calls, postage and sundries, in respect to which the claim of Kshs. 5,000/- was disallowed for lack of supporting receipts or vouchers.*
3. It was the holding of the Taxing Officer that the taxation of the Bill of Costs cannot be based on the anticipated award of Kshs. 350,000/-, which the advocate had suggested as a reasonable quantum for compensating her client, for the injuries which the client had suffered.
4. As far as the Taxing Officer was concerned, she could not allow herself to be drawn into any speculative process.
5. However, the advocate submits that the Taxing Officer was wrong when she refused to examine the authorities provided by the advocate, to justify the proposed quantum of Kshs. 350,000/-.
6. I understand the advocate to be saying that in the face of legal authorities which had awarded compensation for injuries considered comparable to the injuries sustained by the client, she was not indulging in speculation.
7. To my mind, the law is well settled. Even from the authorities cited by the advocate it is clear that the value of the subject matter;

“ought to be determined from the pleadings, judgement or settlement...”

-See the Court of Appeal’s decision in **JORETH LIMITED Vs. KIGANO & ASSOCIATES CIVIL APPEAL No. 66 of 1999.**

8. Similarly, in the case of **GEORGE ARUNGA SINO T/A JUNE BROOKS CONSULTANTS LIMITED Vs PATRICK J.O & GEOFFREY D.O. YONGO T/A ATIENO YOGO & Co. ADVOCATES CIVIL APPEAL No. 35 of 2007 (At Kisumu)**, the Court of Appeal reiterated that the value of the subject matter could be determined from the pleadings in the case.

9. In that case, the client had instructed the advocate to claim a certain amount from the defendant. The learned Judges of Appeal noted as follows;

“If for example he is instructed to claim in contract a certain amount and he files papers claiming that amount, even if eventually the suit is dismissed, as between him and his client his claim will be based on that amount and not be rejected because he lost the suit”.

10. Meanwhile, in the case of **OCHIENG, ONYANGO, KIBET & OHAGA ADVOCATES Vs. ADOPT A LIGHT LIMITED, Misc. CAUSE No. 729 of 2006**, Warsame J. held as follows;

“More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject is unknown, the court is empowered to make what is available as a point of reference. In my view, the point of reference is the figures proposed to and accepted by Mombasa Municipal Council”.

11. He later added that;

“the proposal had been accepted as a true yardstick for the tender.

The Advocate was retained to enhance and protect the award given to the client by Mombasa Municipal Council”.

12. All the authorities point at a value which was either in the pleadings or which had been agreed upon between the client and the advocate.

13. In the case before me, the advocate has not demonstrated that she was instructed to claim the sum of Kshs. 350,000/-.

14. The advocate has also not demonstrated that the said sum can be ascertained from any pleadings.

15. Instead, the advocate had sought to adduce authorities before the Taxing Officer, to try and demonstrate that the sum of Kshs. 350,000/- would have been a reasonable sum, to compensate the client.

16. In my considered view, if the Taxing Officer had delved into the assessment of whether or not those authorities could lead the trial court to award the sums cited by the advocate, that would be tantamount to carrying out a function which was not in her province.

17. Accordingly, by refusing to examine the authorities on quantum, the Taxing Officer cannot be faulted. If anything, the Taxing Officer could have been faulted if she had engaged in the exercise of ascertaining the compensation which may have been deemed reasonable.

18. I do reiterate the following holding, which I made in **F.M. MULWA ADVOCATES Vs. PATRICK MUTHEKE NDETI [2006] e KLR;**

“Again, the rules expressly state that the basic guide, for determining the value of the subject matter is the judgement, the pleadings or the settlement. Therefore, the learned taxing officer was well advised to disregard such evidence as may have been tendered by either party during the taxation or even during the proceedings which preceded the said taxation”.

Court Attendance

19. The advocate pointed out that the respondent had conceded that the advocate did attend court on 1st September 2011.
20. Secondly, she said that the court records clearly showed that the advocate did attend court on that date.
21. Therefore, the Taxing Officer was said to be wrong, when she disallowed the fee claimed for the attendance in question.
22. A perusal of the record of the proceedings during the taxation shows that the respondent did not make a concession about the attendance by the advocate.
23. The respondent simply said that if the court records showed that the advocate did attend court, she should be awarded Kshs. 1,000/-, instead of Kshs. 2,100/-.
24. The learned Taxing Officer held that the advocate had not provided proof of attendance, through either correspondence to her client, or through any other means.
25. I am afraid that the attendance before court is best proved by reference to the record of proceedings.
26. A letter may indicate that an advocate did attend court, but that would not, of itself constitute proof of attendance.
27. When the advocate provided details such as;

“Court record confirms that I was in attendance in court and the matter was adjourned at the instance of Mr. Mwangi for the plaintiff, and plaintiff was ordered to pay court adjournment fees”;

I find that the only way that the Taxing Officer could have disallowed the fee for attendance would be if the record showed something inconsistent with what the advocate had stated.

28. There is no sound reason in law or in fact for the Taxing Officer disallowing the fees for attendance in court on 1st September 2011.

Disbursements

29. In respect to the disbursements, the advocate readily admitted that she did not file any receipt to confirm any of the sums claimed.
30. In **MUTHOGA GATURU & Co. ADVOCATES Vs NACITI ENGINEERS LIMITED Misc. CASE No. 51 of 2001**, Mwera J. (as he then was) held as follows;

“That paragraph (74 of the Remuneration Order) reads;

“74. Subject to paragraph 74 A, receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer”.

In this matter it is not shown that the taxing officer required the advocate to produce vouchers

and receipts for the items of disbursements referred to above. Accordingly, the taxing officer would have done well to allow those items which totalled Kshs. 1,200/- only”.

31. I do not understand the learned Judge to have been laying down a general rule, that if the taxing officer failed to ask the advocate to produce receipts and vouchers, the sums claimed as disbursements should be allowed.

31. In order to get a better appreciation of paragraph 74, it is necessary to compare it to paragraph 74 A, which states as follows;

“1) The taxing officer shall allow reasonable charges and expenses of witnesses who have given evidence and shall take into account all circumstances and without prejudice to the generality of the foregoing, the following factors –

.....”

33. Thus, pursuant to paragraph 74 A, there is no requirement for receipts and vouchers. The factors to be taken into account include;

“a) the loss of time of the witness;

b) if the witness is a party, the time spent giving evidence;

c) the loss of wages or salary to the witness or his employer while attending court;

.....”

34. By specifying that the taxing officer shall allow reasonable charges and witness expenses subject to the factors specified, plus any other relevant factors, the paragraph 74 A of the Remuneration Order must be taken to have created an exception to the general rule of evidence, which requires the person who makes an allegation, to prove it.

35. Mwera J. appears to have been saying that if the sums claimed in respect of disbursements were not substantial, the taxing officer may consider allowing such sums and that too, if the taxing officer had not required the claimant to produce vouchers or receipts to prove the claims.

36. In this case, the advocate has submitted as follows;

“The taxing officer further erred in law and fact by failing to award us costs for disbursements for failure to produce receipts where in our submissions we had explained why we could not produce receipts and when it is clear that some expenses had been incurred by virtue of the services that we had rendered to the client”.

37. In effect, the advocate had no receipts which she could have produced even if the taxing officer had asked her to produce them. Therefore, whether or not the advocate had been asked to produce receipts or vouchers to prove the disbursements incurred, the taxing officer would not have been given anything more. It is not the failure by the taxing officer which was the cause for the advocate’s failure to make available the requisite proof. The inability to produce proof rests completely at the advocate’s door, as she did not have evidence to support the disbursements claimed.

38. Accordingly, I find no fault on the part of the Taxing Officer.

39. In the result, the reference is successful only in relation to the attendance fee. The taxed costs will thus be enhanced by Kshs. 2,100/-.

40. However, the ruling in respect to the Instruction fee and also the disbursements, is upheld.

41. As the reference has succeeded only in part, I order that each party will pay his own costs of the reference.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of August 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Kimani for the Advocate/Applicant

Miss Ameyo for the Client/Respondent

Collins Odhiambo – Court clerk.